No. 85-1589

In The

Supreme Court of the United States

October Term, 1985

IOWA MUTUAL INSURANCE COMPANY,
Petitioner,

v.

EDWARD M. LaPLANTE, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE NAVAJO NATION TRIBE OF INDIANS, CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, ARAPAHO TRIBE OF THE WIND RIVER RESERVATION, SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, AND SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici, Navajo Nation Tribe of Indians, Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, Arapaho Tribe of the Wind River Reservation, Shoshone Tribe of the the Wind River Indian Reservation, and Shoshone-Bannock Tribes of the Fort Hall Reservation are all federally recognized Indian tribes with well-established legal systems, including tribal courts, operating within their respective reservations. Amici all assert civil jurisdiction over claims arising within their respective reservations, including claims by or against non-members. *See*, 7 Navajo Tribal Code § 253(2) and (4); Law and Order Code of the Shoshone-Bannock Tribes §§ 2(b) and 2.1; Confederated Salish and Kootenai Law and Order Code, Chapter II, § 1; 25 CFR § 11.22 establishing Civil jurisdiction of the Courts of Indian Offenses serving the Wind River Indian Reservation (jurisdiction asserted over non-member defendants by consent of parties).

Resolution of the question presented in this case will have broad impact. This case will define the jurisdictional relationship between federal courts in diversity cases and tribal courts concerning claims within tribal jurisdiction under federal treaties and statutes. Specifically, it will determine whether the diversity statute empowers federal courts to intrude upon the jurisdiction of tribal courts in instances in which state jurisdiction would be barred by judicially fashioned doctrines implementing treaties and statutes protecting tribal self-government. Amici have a substantial interest in protecting their rights to be self-governing from diminishment through the intrusion of outside governments, whether state or federal. Hence,

amici submit this brief in support of respondents' position and urge this Court to construe the diversity statute in accordance with longstanding federal policies protective of tribal self-government.

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SUMMARY OF ARGUMENT

1. The plain language of the diversity statute, the legislative history and surrounding circumstances do not reveal the requisite clear and plain congressional intent to empower federal courts to intrude upon the jurisdiction of tribal courts guaranteed by federal treaties and statutes. The conferral of federal and state citizenship upon Inidans does not envince a contrary congressional intent.

2. Construing the diversity statute to provide a federal forum for claims otherwise within the exclusive jurisdiction of Indian tribes defeats the policies of the Erie Doctrine. Similar claims would be subject to different results depending upon whether the claimant were an in-state resident filing in tribal court or an out-of-state resident filing in federal court. Moreover, such a construction enables out-of-state claimants to forum-shop between tribal and federal forums.

3. Both the Ninth Circuit and the Eighth Circuit agree that federal diversity jurisdiction over claims subject to tribal jurisdiction is barred in any instance in which the exercise of such jurisdiction would infringe upon tribal self-government. The alleged conflict between these two circuits as to this rule is illusory as confirmed by a recent decision of the Eighth Circuit issued after this Court granted certiorari in this case.

Moreover, well-established principles governing the substantive rule of decision in diversity cases require that federal law be applied to determine federal questions. The extent of federal and tribal jurisdiction are matters governed by federal law. Thus, when questions as to these matters are raised in a diversity case, the federal court must apply applicable federal law, including the infringement doctrine announced in *Williams v. Lee*, 358 U.S. 219 (1959) and the federal preemption doctrine.

4. In *National Farmers Ins. Co. v. Crow Tribe*, 471 U.S. —, 85 L.Ed.2d 818 (1985), this Court announced the rule that exhaustion of tribal remedies is required before federal courts will address federal questions concerning the nature and extent of tribal jurisdiction. Although that case was based upon federal question jurisdiction, the rule should also apply when such federal questions are raised in diversity cases.

Assuming that this Court rules that federal diversity jurisdiction is limited by the infringement doctrine, Iowa Mutual concedes that, under that doctrine, Montana courts would have no jurisdiction over the claim raised herein. There being no question raised as to the Blackfeet Tribe's jurisdiction over the claim, the federal court should simply dismiss this case for lack of jurisdiction.

5. The Ninth Circuit's opinion in this case in dictum adopts a rule that would provide a federal forum under diversity jurisdiction over any claim within a tribe's jurisdiction, but for which the tribe does not provide a forum. The rule is grounded upon the notion that where there is no tribal forum, a federal forum would not infringe upon tribal self-government. However, this rule is unsound

because it fails to recognize that under the federal preemption doctrine, where federal treaties and statutes reserve exclusive jurisdiction in a tribe, state and federal jurisdiction are precluded, notwithstanding that a tribe has not provided a forum for all claims that may arise within its jurisdiction. Amici submit that, should this Court affirm the Ninth Circuit's decision, the affirming opinion should expressly indicate disapproval of the aforediscussed rule.

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ARGUMENT

I. THE DIVERSITY STATUTE DOES NOT GRANT JURISDICTION OVER ACTIONS AGAINST INDIANS ARISING ON THE RESERVATION

A. Federal Diversity Jurisdiction Would Infringe Upon Tribal Rights of Self-Government Guaranteed By Federal Law

Petitioner Iowa Mutual Insurance Company (hereinafter "Iowa Mutual") concedes that Montana courts have no jurisdiction over its claim because such jurisdiction would infringe upon tribal self-government. *See, Petitioners Brief* at 5 and 7. And indeed, it is well settled that tribal Indians have a federal right to make their own laws and be governed by them. *See, e.g., Williams v. Lee,* 358 U.S. 217, 223 (1959); *McClanahan v. Arizona State Tax Comm'n.,* 411 U.S. 164 (1973). Accordingly, tribal courts have exclusive jurisdiction over civil actions arising on the reservation where the defendant is a tribal member. *See, e.g., Williams v. Lee,* 358 U.S. at 233; *Kennerly v. District Court of Montana,* 400 U.S. 423, 427-30 (1971); *Fisher v. District Court* 424 U.S. 382, 389 (1976). The diversity statute would conflict with tribal jurisdiction by providing a federal forum for such actions.

This Court has previously recognized that construing a federal statute to provide a federal forum for issues otherwise within tribal jurisdiction

> "constitutes an interference with tribal autonomy and self-government. . . . Even in matters involving commercial and domestic relations, we have recognized that "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves" [citation omitted] may "undermine the authority of the tribal cour[t] . . . and hence . . . infringe on the right of Indians to govern themselves." [citation omitted]

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59-60 (1977). In *Santa Clara Pueblo,* this Court declined to construe the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302, to provide a federal forum for the resolution of issues arising under that Act.

B. The Congressional Intent To Interfere With Tribal Jurisdiction Must Be Clear and Plain

A determination of whether the diversity statute, as a general federal statute, applies to permit federal courts to intrude upon the jurisdiction of tribal courts turns on the intent of Congress. *Bryan v. Itasca County,* 426 U.S. 373, 393 (1976), citing *Mattz v. Arnett,* 412 U.S. 481, 504-505 (1973), *United States v. Dion,* 476 U.S. —, 90 L.Ed.2d 767 (1986). A congressional intent to abrogate federal rights granted to Indians must be "clear and plain." *United States v. Dion,* 90 L.Ed.2d at 773; *United States v. Santa Fe Pacific R. Co.,* 314 U.S. 339, 353 (1941). The standard for determining the "clear and plain" intent of Congress has varied. As explained in *United States v. Dion,* 90 L.Ed.2d at 774:

We have enunciated . . . different standards over the years for determining how such a clear and plain intent must be demonstrated. In some cases, we have required that Congress make "express declaration" of its intent to abrogate treaty rights. [Citations omitted.] In other cases, we have looked to the statute's "'legislative history'" and "'surrounding circumstances'" as well as to "'the face of the Act.'" [Citations omitted.] Explicit statement by Congress is preferable for the purpose of ensuring legislative accountability for the abrogation of treaty rights. [Citation omitted.] We have not rigidly interpreted that preference, however, as a per se rule; where the evidence of congressional intent to abrogate is sufficiently compelling, "the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute." [Citation omitted.] What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.

Moreover, the requirement that the congressional intent to authorize an intrusion upon tribal sovereignty be clear and plain is especially compelling when it is contended that federal courts are empowered to intrude upon the jurisdiction of tribal courts. This Court emphasized in *Santa Clara Pueblo v. Martinez,* that a construction of the Indian Civil Rights Act not to provide a federal forum was consistent with the longstanding recognition that judicial restraint is particularly appropriate in the area of Indian affairs, and that the federal courts will require Congress to make clear any "intention to permit the . . . intrusion on tribal sovereignty that adjudication of . . . actions [within tribal court jurisdiction] in a federal forum would represent. . . ." 436 U.S. at 72; *see also, Lone Wolf v. Hitchcock,* 187 U.S. 553, 565 (1903); *United States v. Holliday,* 3 U.S. (Wall) 407, 418-420 (1866).

C. The Requisite Clear And Plain Congressional Intent Is Not Envinced By The Diversity Statute's History

The history of the diversity statute falls far short of manifesting the requisite clear and plain congressional intent to vest federal courts with diversity jurisdiction to adjudicate the merits of reservation-based claims against tribal members.

The diversity statute, 28 U.S.C. § 1332, was originally enacted as section 11 of the Judiciary Act of 1789. *See,* Judiciary Act, ch. 20 § 11, 1 Stat. 73, 78-79 (1789).[1] The historical purpose of the diversity statute was to permit civil actions between "citizens of different states" to be brought in a neutral federal forum. To be a citizen of a state within the meaning of the diversity statute, a person must be both a citizen of the United States and a domiciliary of a state. This was the rule before and after the adoption of the Fourteenth Amendment. *See* 1 J. Moore, W. Taggert & J. Wicker, *Moore's Federal Practice* ¶ 707.1 (2d ed. 1981).

The diversity statute on its face as originally enacted and as presently constituted, makes "no mention of In-

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[1]The original act states that "the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars . . . and the suit is between a citizen of the state where the suit is brought, and a citizen of another state." 1 Stat. 73 at 78.

dians and it is unlikely that Congress had the future status of Indian tribes in mind when it passed the statute." *Superior Oil Co. v. Merritt,* 619 F.Supp. 526, 533 (D.C. Utah 1985).[2] Thus, there is no "express declaration" by Congress in the diversity statute authorizing federal courts to assume diversity jurisdiction over claims subject to the exclusive jurisdiction of Indian tribes.

Moreover, the circumstances surrounding the passage of the diversity statute show that when the statute was passed, tribes and their members were viewed as a people separate and distinct from states both politically and territorially.

The United States Constitution was ratified in 1787, two years prior to the Judiciary Act. The Constitution contains the Commerce Clause which gives Congress exclusive federal authority in the area of Indian affairs. *U.S.Const.* Art. I, § 8, cl. 3. The Commerce Clause empowers Congress to "regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes." This clause clearly reflects the prevailing view that tribes were considered as separate entities from states.

This view of the separateness of Indian tribes is also reflected in two early landmark decisions of this Court. In *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832), this

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[2]Also the Amendments make no mention of Indians, tribes or Indian reservations. *See,* Act of April 20, 1940, ch. 117, 54 Stat. 143; Act of June 25, 1948, ch. 646, 62 Stat. 869; Act of July 26, 1956, ch. 740, 70 Stat. 658; Act of July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Act of August 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445; Act of October 21, 1976, Pub.L. 94-583, § 3, 90 Stat. 2891.

Court held that Georgia's laws do not apply within the Cherokee reservation:

> From the commencement of our government, Congress has passed acts to regulate trade and intercourse with Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive. . . .

Id. at 556-557.

In addition, in *United States v. Kagama,* 118 U.S. 375 (1886), this court held that tribes

> were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as Nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

Id. at 381-382.

Indeed, at the time the Judiciary Act was passed in 1789, Indians were not citizens of the United States unless they were naturalized individually or collectively by federal statute or treaty.[3] In 1884, shortly after the passage

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[3]*See, generally,* F. Cohen, *Handbook of Federal Indian Law* 142-143 (1982). A few tribes were granted citizenship by special statute. The Dawes Act of 1887, ch. 119, § 6, 24 Stat. 388, 390, 25 U.S.C. § 349, also granted citizenship to allottees under

(Continued on following page)

of the Fourteenth Amendment, this Court held that Indians were not made citizens of the United States by the Fourteenth Amendment because they were not subject to the jurisdiction of the United States. *Elk v. Wilkins,* 112 U.S. 94 (1884). Thus, it was early held that, since tribal Indians were not citizens within the meaning of the Fourteenth Amendment, they could not invoke the diversity jurisdiction of the federal courts. *Paul v. Chilsoquie,* 70 F. 401, 402 (C.C.D. Ind. 1895).

Indians who were not yet United States citizens were made citizens by the Act of June 2, 1924, ch. 233, 43 Stat. 253, which provides that

> all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States; *Provided,* That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

Significantly, however, Congress enacted the 1924 Act against a backdrop of Supreme Court decisions that conclusively established that the conferral of citizenship *per se* did not abrogate tribal sovereignty or the plenary power of Congress over Indians. In *United States v. Nice,* 241 U.S. 591 (1916), the Court upheld a statute prohibiting sale of liquor to Indians on a reservation and rejected *inter alia*

(Continued from previous page)

that Act. This was amended by the Burke Act of 1906, ch. 2348, § 6, 34 Stat. 182, 25 U.S.C. § 349, which granted citizenship only to those Indians who received a patent in fee. The Act of August 9, 1888, ch. 818, § 2, 25 Stat. 392, 25 U.S.C. § 182, granted citizenship to Indian women who married white men. The Act of November 6, 1919, ch. 95, 41 Stat. 350, granted citizenship to Indians who served in the armed forces during World War I.

the argument that the grant of citizenship to Indians who took allotments under the General Allotment Act was incompatible with tribal existence and federal guardianship. The Court said:

> Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection.

Id. at 598. Accord; *United States v. Holliday,* 3 U.S. (Wall) 407, 418-420 (1866); *United States v. Celestine,* 215 U.S. 278, 288-291 (1909); *Hallowell v. United States,* 221 U.S. 317, 322-325 (1911); *Marchie Tiger v. Western Invest. Co.,* 221 U.S. 286, 310-316 (1911); *United States v. Sandoval,* 231 U.S. 28, 48 (1913); *Winton v. Amos,* 255 U.S. 373, 391-392 (1921).

Thus if Congress had intended to disturb the pre-existing rights of tribal Indians or the federal relationship with tribes, it would undoubtedly have said so expressly in the 1924 Act since the mere conferral of citizenship would not have had that effect.

Accordingly, in *Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89, 98 (8th Cir. 1956), the court held:

> That Congress did not intend by the granting of citizenship to all Indians born in the United States to terminate the Indian Tribal Court system is patent from the fact that at the same session of Congress and at sessions continuouly [sic] subsequent thereto funds have been appropriated for the maintenance of the Indian Tribal Courts. We hold that the granting of citizenship in itself did not destroy tribal existence or the existence or jurisdiction of the Indian Tribal courts and that there was no intention on the part of Congress so to do.

Accord, Boyer v. Shoshone-Bannock Indian Tribes, 92 Idaho 257, 260 (1968) ("[T]he fact that all Indians are now citizens does not affect the jurisdiction of tribal courts.")

In summary, the evidence is far from clear that Congress in enacting the diversity statutes intended to authorize federal courts to intrude upon the jurisdiction of tribal courts exercised under the protection of federal treaties and statutes. Hence, this Court should find that the diversity statutes does not grant federal jurisdiction over claims against Indians arising within an Indian reservation.

D. Withholding Diversity Jurisdiction Over Claims Subject To Tribal Jurisdiction Is Consistent With Established Federal Indian Policies

Furthermore, construction of the diversity statute to preclude federal jurisdiction over claims against Indians arising on the reservation is consistent with the well established "federal policy of furthering Indian self-government." *Santa Clara Pueblo v. Martinez,* 436 U.S. at 62; quoting *Morton v. Mancari,* 417 U.S. 535, 551 (1974); and *see, Fisher v. District Court,* 424 U.S. 382, 391 (1976). This Court has said that general federal statutes must be construed "in accord with the policy reflected by the legislation of Congress and its administration for many years. . . ." *United States v. Quiver,* 241 U.S. 602, 606 (1916) (holding that federal penal code applicable to federal enclaves does not apply to Indian reservations).

II. DIVERSITY JURISDICTION OVER RESERVATION-BASED CLAIMS BARRED FROM STATE COURT BY FEDERAL LAW DEFEATS THE PURPOSES OF THE ERIE DOCTRINE

Iowa Mutual argues that the policies underlying the Erie Doctrine are not abridged by the exercise of federal diversity jurisdiction over reservation-based claims against Indians barred from state court by the infringement and preemption doctrines. *See, Petitioner's Brief* at 5-7; and *Petition for a Writ of Certiorari,* at 9. The purposes of the Erie Doctrine are to avoid the inequitable administration of laws and to discourage forum shopping. *Hanna v. Plumer,* 380 U.S. 460, 468 (1965). Contrary to Iowa Mutual's contention, those policies would be defeated by approving the exercise of diversity jurisdiction over claims barred from state court.

First, the exercise of diversity jurisdiction over reservation-based claims barred from state courts reinstates the problem of inequitable administration of the laws. Claims of in-state claimants would be restricted to a tribal forum applying tribal law while similar claims of out-of-state claimants could be brought in a federal forum applying state law.[4] Thus there is a strong possibility that the same claim would be subject to different results depending upon whether the claimant were an in-state or out-of-state resident. As stated in *Woods v. Interstate Realty,* 337 U.S. 535, 538 (1949):

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[4]Iowa Mutual states that Poitra v. DeMarrias, 502 F.2d 23 (8th Cir. 1974) sets forth "the correct view of the question presented in this case." *See,* Petition for Writ of Certiorari at 9. Since the Poitra court applied state law in determining the claim raised in that case, it may be assumed that Iowa Mutual takes the position that state law provides the rule of decision in diversity cases.

> [W]here in [diversity] cases one is barred from recovery in the state court, he should likewise be barred in the federal court. The contrary result would create discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that Erie R. Co. v. Tompkins was designed to eliminate.

Second, the exercise of diversity jurisdiction over reservation-based claims barred from state courts would allow an out-of-state claimant the choice of bringing an action in federal court where state law would be applied and bringing an action in tribal court where tribal law would be applied. Such a situation plainly reinstitutes the problem of forum shopping which the Erie Doctrine was intended to discourage, even though the forums involved are federal and tribal, rather than federal and state.

Clearly, petitioner's contention that federal diversity jurisdiction over the claim in this case is consistent with the policies underlying the Erie Doctrine cannot stand.[5]

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[5]If, on the other hand, petitioner is arguing that tribal law would provide the rule of decision in an appropriate case, such as the instant case where the tribal court has exclusive jurisdiction, that contention raises its own set of problems. The principal difficulty inherent in this contention is summarized in F. Cohen *Handbook of Federal Indian Law, supra* at 317-318 n.291:

> Applying tribal law, as a tribal court would, is unprecedented and clashes with the Rules of Decision Act, 28 U.S.C. § 1652, as interpreted in Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

III. IOWA MUTUAL'S CONTENTION THAT DIVERSITY JURISDICTION IS NOT CONTINGENT UPON APPLICATION OF THE INFRINGEMENT DOCTRINE LACKS ANY SUPPORT IN CASELAW.

Iowa Mutual contends that this Court should hold that federal courts in diversity cases may exercise jurisdiction over reservation-based claims against Indians notwithstanding that the exercise of such jurisdiction by state courts would be barred by application of the infringement doctrine announced in *Williams v. Lee,* 358 U.S. 217 (1959). Iowa Mutual also contends that there is a conflict between the Eighth and Ninth Circuits as to the correctness of its position. In this part of the brief, amici will demonstrate that Iowa Mutual's position lacks support in both the Eighth and Ninth Circuits, and that application of the infringement doctrine to determine diversity jurisdiction over claims against Indians arising on a reservation is consistent with general principles governing what law applies in diversity cases.

A. Both The Eighth And Ninth Circuits Agree That The Infringement Doctrine Applies To Determine Diversity Jurisdiction

Iowa Mutual asserts that there is a conflict between the Ninth Circuit's decision in *R. J. Williams Co. v. Fort Belknap Housing Authority,* 719 F.2d 979 (9th Cir. 1983), on which this case relies, and the Eighth Circuit's decision in *Poitra v. DeMarrias,* 502 F.2d 23 (8th Cir. 1974). Amici, however, agree with the respondent LaPlante, that the alleged conflict is illusory. A careful examination of the *Poitra* decision reveals that the Eighth Circuit, like the Ninth Circuit, adopts the rule that a federal court in diversity cases may exercise jurisdiction over reservation-

based claims against tribal members *unless* such action would interfere with tribal self-government. *Poitra,* 502 F.2d at 28-29; *R. J. Williams,* 719 F.2d at 983-984.

The *Poitra* court expressly approved the Ninth Circuit's decisions in *Hot Oil Service, Inc. v. Hall,* 366 F.2d 295 (9th Cir. 1966); and *Littell v. Nakai,* 344 F.2d 486 (9th Cir. 1965). In each of those cases, the Ninth Circuit held that it had no diversity jurisdiction over a reservation-based claim against an Indian because the exercise of such jurisdiction would interfere with tribal self-government. *Poitra,* 502 F.2d at 28-29. The *Poitra* court, however, distinguished those cases, *inter alia,* on the ground that the claims involved tribal lands and a contract with the tribal government, whereas *Poitra* involved private litigants and a private dispute. *Poitra,* 502 F.2d at 29. Plainly, the *Poitra* court applied the infringement doctrine to determine whether it had diversity jurisdiction over the claim.

However, confusion resulted from the *Poitra* decision because the Eighth Circuit based the decision on two apparently inconsistent findings. First, the Eighth Circuit found that, on the facts of *Poitra,* diversity jurisdiction would not infringe on tribal self-government. And second, the Court found that North Dakota's door-closing statute implemented a federal statute—Pub.L. 280, 25 U.S.C. § 1322(a), and hence, was not a state law or policy which the Erie Doctrine requires federal courts sitting in diversity to follow. The Court, however, failed to explain in express terms why it was bound to apply the federal infringement doctrine announced by this Court in *Williams v. Lee,* 358

U.S. 217 (1959),[6] but not the terms of a federal statute, Pub. L. 280.

The failure of *Poitra* Court to explain this apparent inconsistency, coupled with the lack of specific language in the opinion expressly finding that federal diversity jurisdiction is contingent upon a finding of non-infringement of tribal self-goverment, resulted in an erroneous decision by the federal district court in *American Indian National Bank v. Red Owl,* 478 F.Supp. 302 (D.S.D. 1979). The *Red Owl* court, construed *Poitra* to mean that a federal court in diversity cases is not obligated to apply the federal infringement doctrine because it is not a state policy.

Petitioner Iowa Mutual now relies upon the *Red Owl* court's erroneous interpretation of *Poitra* for its contention that there is a conflict between the Eighth and Ninth Circuits as to whether the infringement doctrine applies in determining whether diversity jurisdiction may be exercised in this case.

Any doubt as to the Eighth Circuit's view of the applicability of the infringement doctrine to determine the propriety of diversity jurisdiction was laid to rest by that

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[6]It may be inferred that the Poitra Court erroneously viewed P.L. 280 as offering an option to North Dakota to disclaim jurisdiction over the claims in question. That view is consistent with the then erroneous view of North Dakota courts that the state had preexisting jurisdiction over such claims. *See,* Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957). The Vermillion decision was determined to be wrong in two recent cases in this Court. *See,* Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138, 148 (1984); Three Affiliated Tribes v. Wold Engineering, 476 U.S. —, 90 L.Ed.2d 881, 887 (1986). Hence, North Dakota's legislative action pursuant to the P.L. 280 offer implemented what the Poitra court viewed as an optional federal policy. In contrast, the infringement doctrine is not optional.

Court's recent decision in *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, Nos. 85-5129 and 85-5130 (8th Cir. July 29, 1986). In *Weeks*, the Eighth Circuit confirmed its view that the infringement doctrine applies in determining its diversity jurisdiction over reservation-based claims by non-Indians against Indians. *See, Weeks*, slip op. at 9-10.[7]

Thus, Iowa Mutual's arguments that the infringement doctrine announced in *Williams v. Lee* should not be applied by federal courts in determining whether to exercise diversity jurisdiction over reservation-based claims against Indians finds no support in the decisions of the Eighth Circuit. The only support for that argument is the misconstruction of *Poitra* in the *Red Owl* case.[8]

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[7]The Co... avoided the question of whether Poitra was wrong in determining that diversity jurisdiction may be exercised over a claim between tribal members arising on the reservation. The Court suggested that the unique facts of that case would support a finding of non-infringement. *See*, Weeks, slip op. at 10 n.7. Amici submit that Poitra was wrong by application of the preemption doctrine. Tribes have exclusive jurisdiction over such claims between tribal members under federal treaties and statutes. *See, e.g.*, Fisher v. District Court, 424 U.S. 382 (1976). And *see* the discussion in part V of this Brief, *infra*.

[8]Any argument that the infringement doctrine does not preclude diversity jurisdiction over reservation-based private disputes between non-Indians and Indians is plainly unsound. *See*, Williams v. Lee, 358 U.S. 217 (1959); R. J. Williams, 719 F.2d 979 (9th Cir. 1983); Weeks, Nos. 85-5129 and 85-5130 (8th Cir. July 29, 1986). However, at least one district court relying on the Poitra decision has erroneously held that diversity jurisdiction over such claims does not infringe on tribal self-government. American Indian Agr. Credit v. Fredericks, 551 F.Supp. 1020, 1021-1022 (D. Colo. 1982).

B. Application Of The Infringement Doctrine Is Consistent With General Principles Governing The Law To Be Applied In Diversity Cases

Iowa Mutual's contention that a "judicially announced policy," i.e. the infringement doctrine, cannot bar diversity jurisdiction over reservation-based claims against Indians, *see*, Petitioner's Brief at 6, finds no support in general principles delineating the law to be applied in diversity cases.

The Rules of Decision Act, 28 U.S.C. § 1652, requires that state substantive law be regarded as the rule of decision in federal courts in diversity cases "except where the Constitution or treaties of the Uited States or Acts of Congress otherwise require or provide. . . ." This Court has construed this Act to mean that federal law provides the substantive rule of decision in diversity cases "with respect to subject matter over which Congress plainly has power to legislate." *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967); *Kelly v. Kosuga*, 358 U.S. 516, 519 (1959); and *see, generally*, IA *Moore's Federal Practice (Part 2)*, ¶ 0.324 (1985). It is thus well-established that the application of federal law in diversity cases is consistent with the Erie Doctrine where the subject matter is federal in nature. *See, e.g., Sola Electric Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942); *Kelly v. Kosuga*, 358 U.S. at 519.

Moreover, the federal law, which is binding on federal and state courts by force of the Supremacy Clause of the United States Constitution, Article VI, cl. 2, is not limited to statutes and treaties, but includes judicial decisions which comprise the federal common law. *See, e.g., Free v. Bland*, 369 U.S. 663, 668 (1962); *Banco Nacional De Cuba v. Sab-*

batino, 376 U.S. 398, 421-427 (1964); *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964); *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 361 U.S. 95 (1962); *Hinderlider v. LaPlata River Co.*, 304 U.S. 92, 110 (1938).

This Court has determined in a number of cases that federal common law applies to determine the rights of Indian tribes. *See e.g., Oneida v. Oneida Indian Nation*, 470 U.S. —, 84 L.Ed.2d 169, 179 (1985) (tribal right to sue to enforce aboriginal land rights); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-667 (1974) (tribal right to sue for possession of land); *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941) (tribal right to sue trespassers for accounting); *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. —, 85 L.Ed.2d 818, 824-825 (1985) (the extent of tribal judicial jurisdiction over non-Indian tortfeasor).

Especially relevant to the question in this case is this Court's recent decision in *National Farmer's Union Ins. Co. v. Crow Tribe*. In that case, it was held that the extent of a tribe's judicial jurisdiction over a non-Indian tortfeasor where the tort occurred within the reservation presents a federal question:

> [T]he power of the Federal Government over the Indian tribes is plenary. Federal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the individual, territorial, and political rights of the Indian tribes.

85 L.Ed.2d at 824; *accord; Oneida v. Oneida Indian Nation*, 84 L.Ed.2d at 179.

Indeed, this Court has said that the policy adopted by Congress in those areas within Congress' legislative

authority under the Constitution is as much the policy of states as if the law had emanated from the states' own legislatures. In *Testa v. Katt*, 330 U.S. 386, 392 (1947), this Court soundly rejected the contention that Connecticut courts could decline to enforce federal statutory rights deemed contrary to Connecticut policy:

> The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.

Id. at 392; *accord, McKnett v. St. Louis & San Francisco Railway Co.*, 292 U.S. 230, 234 (1934); *Mondou v. N.Y., & H.R. Co.*, 223 U.S. 1 (1912).

Thus, general principles governing the law to be applied by federal courts in diversity cases require that the federal infringement doctrine be applied to determine whether diversity jurisdiction may be exercised over a reservation-based claim against an Indian.

IV. THE EXHAUSTION RULE ANNOUNCED IN NATIONAL FARMERS UNION INS. CO V. CROW TRIBE SHOULD BE APPLIED WHERE APPROPRIATE IN DIVERSITY CASES

Amici urge this Court to affirm the Ninth Circuit's decision that federal courts in diversity cases are, like state

courts, barred from asserting jurisdiction over a claim when such assertion would infringe on tribal self-government. Assuming this Court affirms that decision, the holding in *National Farmer's Union Ins. Co. v. Crow Tribe*, 471 U.S. —, 85 L.Ed.2d 818 (1985), should then apply where a question is raised concerning the extent of tribal jurisdiction over the claim in question.

In *National Farmers Union*, this Court ruled that federal questions concerning the nature and extent of tribal court jurisdiction must be referred to the tribal court for initial examination. That holding should also govern when such federal questions are raised in diversity cases. As shown in part III B, *supra*, federal law provides the substantive rule of decision as to federal questions raised in diversity cases.

In this case, however, Iowa Mutual does not question the jurisdiction of the Blackfeet Tribe over the claim raised. Iowa Mutual concedes that the State of Montana would not have jurisdiction over its claim because such jurisdiction would intrude upon tribal rights of self-government. *See, Petitioner's Brief* at 5-7. As Iowa Mutual states: "what precludes Iowa Mutual from suing the LaPlantes and the Willman's in Montana courts is the latter's status as reservation Indians." *Id.* at 7.

Hence, assuming the infringement doctrine is held to limit federal diversity jurisdiction, Iowa Mutual concedes that that doctrine vests exclusive jurisdiction in the Blackfeet tribal court over its claim. The rule in *National Farmers Union* therefore need not be applied, and the federal court should simply dismiss this case for lack of jurisdiction.

V. THE EXERCISE OF DIVERSITY JURISDICTION MAY BE BARRED BY THE PREEMPTION DOCTRINE, EVEN THOUGH THE TRIBE DOES NOT EXERCISE JURISDICTION OVER THE CLAIM

The Ninth Circuit, in its opinion in this case, reaffirmed the rule adopted in its earlier decision *R. J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 983-984 (9th Cir. 1983), that federal courts in diversity cases, have jurisdiction over claims which federal law vests exclusively in an Indian tribe, if there is no tribal forum for such claims.[9] The Ninth Circuit reasoned that in these instances, there is no interference with tribal rights of self-government. *Id.* This position is unsound because it fails to consider that state jurisdiction and federal diversity jurisdiction over reservation-based claims against tribal members is delimited not only by the infringement doctrine, but by the preemption doctrine as well. This Court has repeatedly emphasized that

> the assertion of state authority over tribal reservations remains subject to "two independent but related barriers." [Citation omitted.]
>
> First, a particular exercise of state authority may be foreclosed because it would undermine "the right of reservation Indians to make their own laws and be ruled by them." [Citation omitted.]

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[9]This position is dictum in the opinion. However, amici are concerned that an affirmance by this Court of the Ninth Circuit's decision may be broadly construed to affirm the position that lack of a tribal forum permits federal courts to assert diversity jurisdiction over claims otherwise within tribal jurisdiction. Hence, amici present this argument to show the Court the unsoundness of this position. Based upon this showing, amici urge this Court, in affirming the Ninth Circuit's decision, expressly to disapprove the aforestated position.

> Second, state authority may be preempted by incompatible federal law.

Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138, 148 (1984.)

The decisions of this Court have conclusively established that tribal jurisdiction over reservation-based claims by non-Indians against Indians is exclusive under both the infringement and the preemption doctrine. *See, e.g., Williams v. Lee,* 358 U.S. 217, 221-223 (1959); *Kennerly v. District Court of Montana,* 400 U.S. 423, 426-428 (1971); *Three Affiliated Tribes v. Wold Engineering,* 467 U.S. 138, 148 (1984); *Three Affiliated Tribes v. Wold Engineering,* 476 U.S. —, 90 L.Ed.2d 881, 887 (1986).

Under the infringement test, the question for state courts and federal courts in diversity cases is whether the exercise of jurisdiction over reservation-based claims by non-Indians against Indians will interfere with tribal self-government. *McClanahan v. Arizona Tax Commission,* 411 U.S. 164, 179 (1973). And under the preemption test, the question is whether the claim "is totally within the sphere which the relevant treaty and statutes leave . . . for the Indians themselves." *McClanahan* at 179-180. State courts and federal courts in diversity cases must apply both tests in determining whether they may exercise jurisdiction over claims which are within a tribe's jurisdiction. It is possible that the exercise of state or federal jurisdiction over a claim will not contravene the infringement doctrine, but will contravene the preemption doctrine.

The controlling case is *Kennerly v. District Court of Montana,* 400 U.S. 423 (1971). In *Kennerly,* this Court held that Montana was barred from exercising jurisdiction over

a claim by a non-Indian against a Blackfeet tribal member which arose on the reservation, even though the Blackfeet Tribe legislatively authorized Montana to exercise concurrent jurisdiction over such claims. The Court held that Montana could acquire such jurisdiction only by compliance with the procedure set forth in Pub.L. 280, 25 U.S.C. §§ 1321-26. *Kennerly,* 400 U.S. at 427.

A fortiori, a state must also be prohibited from exercising exclusive jurisdiction over such claims, absent compliance with Pub.L. 280, when the tribe has legislatively determined not to exercise jurisdiction over such claims and has not expressly consented to state jurisdiction.

Likewise, in *McClanahan,* this Court expressly held that where federal law reserves exclusive jurisdiction in a tribe, a state may not exercise jurisdiction over claims subject to exclusive tribal jurisdiction even though tribal self-government will not be infringed. *McClanahan* held that an Arizona income tax could not lawfully be applied to income of Navajo Indians and their property on the Navajo reservation where the state had not acquired jurisdiction to tax on-reservation income and property by complying with Pub.L. 280, even though the Tribe itself did not tax such income. The reservation activity sought to be taxed by Arizona was found to be

> totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves. Appellee cites us to no cases holding that this legislation may be ignored simply because tribal self-government has not been infringed.

McClanahan, 441 U.S. at 179-180. The Court relied on its previous decision in *Kennerly* for the principle that non-infringement of tribal self-government is an insufficient

basis to overcome federal law reserving exclusive tribal jurisdiction over claims.

The principle established by *Kennerly* and *McClanahan* is soundly based in the congressional policy of encouraging tribal self-government. This policy basis is well-stated in *Enrique v. Superior Court,* 115 Ariz. 342, 565 P.2d 522 (Ct. App. 1977) in which the state court declined to take jurisdiction over a reservation-based tort claim by a non-Indian against an Indian, even though there was no showing that a tribal forum existed:

> [The] right of self-government includes the right to decide what conduct on the reservation will subject the Indians living there to civil liability in the Tribal court. The fact that the record here does not disclose whether the Tribal court does in fact provide a forum for the recovery for personal injuries is of no moment since assumption of jurisdiction by the state court would be, in effect, a declaration by a state court that such conduct is tortious, a declaration that only the . . . Tribe can make.

Id. at 523. *See, also,* F. Cohen, *Handbook of Federal Indian Law* 351 (1982) ("A tribe's legislative jurisdiction over its own people and within its own territory must include the right not to legislate at all in an area, if self-government is to be meaningful.")

Thus, amici submit that the rule adopted by the Ninth Circuit in *R. J. Williams,* and reaffirmed in this case, is directly contrary to this Court's decision in *Kennerly* and *McClanahan,* because it fails to test the propriety of diversity jurisdiction by the preemption doctrine as well as by the infringement doctrine. This failure effectively transforms the infringement doctrine into a tool for the diminishment of jurisdiction reserved to tribes by federal

treaties and statutes. Such a result is directly contrary to this Court's consistent view of the infringement doctrine as one of two independent "bars" to the assertion of state authority over tribal reservations. *See, Three Affiliated Tribes v. Wold Engineering,* 467 U.S. at 148.[10]

In this case, the Blackfeet tribal court, at the trial level, has now ruled that tribal law empowers that court to adjudicate Iowa Mutual's claim in this case of non-liability under an insurance contract.[11] The memorandum and order of the Blackfeet tribal court setting forth this ruling is reproduced in the parties' Joint Appendix at 33-44. Based upon this tribal decision, under the infringement doctrine, the Blackfeet tribal court has exclusive

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[10]While the infringement doctrine may be applied as the threshold test for exclusive tribal jurisdiction, see Fisher v. District Court, 424 U.S. 382, 386 (1976), its most appropriate application is in those cases in which the tribe and the state have concurrent jurisdiction. A typical example of such a case is a reservation-based claim by a tribal member against a non-Indian. In Three Affiliated Tribes v. Wold Engineering, 476 U.S. —, 90 L.Ed.2d 881 (1986) (Wold II), the Court ruled that North Dakota had jurisdiction over such a claim "for which there is no other forum." 90 L.Ed.2d at 889. This decision was based upon the Court's reasoning in Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 467 U.S. 138 (1984) (Wold I), that the exercise of state jurisdiction over the claim was "compatible with tribal autonomy when . . . the suit is brought by the tribe itself and the tribal court lacked jurisdiction over the claim at the time the suit was instituted." *Id.* at 122.

[11]Generally, an insurance company presents a claim of non-liability through a declaratory judgment action against the insured. *See, e.g., 7 Williston on Contracts* § 914 at 423-24 (1963). However, the tribal court apparently allowed this claim to be presented by the company as a defense in the original action brought against the Wellmans and Iowa Mutual Insurance Company as the Wellman's insurer. In either instance, the claim is clearly classifiable as a claim against an Indian defendant.

jurisdiction over petitioner's claim and such claim cannot be adjudicated on its merits in this diversity action.

CONCLUSION

For all of the above reasons, the decision of the Ninth Circuit that federal diversity jurisdiction is delimited by the infringement doctrine announced in *Williams v. Lee* should be affirmed.

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